

The Honorable Joan Delabreau
Chairwoman
Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, Wisconsin 54135-0910

Dear Chairwoman Delabreau:

Thank you for your letter about the proposed Aquila Resources Inc. Back Forty Project and to request that the U.S. Environmental Protection Agency require meaningful consultation between the State of Michigan and the Menominee Indian Tribe of Wisconsin regarding the proposed project.

While I appreciate your request, the EPA does not have the authority to enter into a programmatic agreement to resolve objections to the wetland permit required by section 404 of the Clean Water Act. Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of federal undertakings on historic properties and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. As currently proposed, the Back Forty Project requires no federal undertaking because all of the permit decisions for the project are the responsibility of the State of Michigan under federally approved state authorities covering the National Pollutant Discharge Elimination System permit program (Section 402 of the Clean Water Act, 33 U.S.C. § 1342), the wetlands/dredge and fill permit program (Section 404 of the CWA, 33 U.S.C. § 1344) and Title 1 of the Clean Air Act (42 U.S.C. § 7475). The EPA retains an oversight role to review the State of Michigan's permits and ensure their consistency with these federal statutes. In addition, Michigan maintains state authority to issue mining permits under Part 632 of its Natural Resources and Environmental Protection Act. The EPA does not have authority to oversee the state's Part 632 permits. Because the final permit decisions made under all of these authorities are state decisions, they are not subject to NHPA review.

While there is no basis for the EPA to consult or to enter into an agreement with the state and tribe pursuant to Section 106 of the NHPA, the EPA is willing to engage in consultation with the tribe pursuant to the agency's government-to-government consultation policy. The process would be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>).

If you are interested in pursuing consultation, please contact:

Mr. Christopher Korleski (W-15J)
 Director, Water Division
 U.S. Environmental Protection Agency, Region 5
 77 West Jackson Boulevard
 Chicago, Illinois 60604

I understand that EPA Region 5 has been contacted by a representative of your tribe to discuss concerns about the Clean Water Act Section 404 permit application for this project. Region 5 is working to schedule a meeting with the tribe on this topic. Also, in response to your November 28, 2016, letter to Region 5's Peter Swenson that raised concerns about the Back Forty Project, the region has been in contact with tribal staff about scheduling a meeting to better understand your concerns.

In your January 23, 2017, letter, you also requested that the EPA exercise its federal oversight over the permitting processes for the proposed project. The EPA has exercised its discretionary authority to engage with the Michigan Department of Environmental Quality on each of the three permits required by federal law:

Clean Air Act Permit: During the public comment period, the EPA provided MDEQ a comment letter dated October 26, 2016, stating concerns with some of the draft air construction permit conditions. As part of its permitting process, MDEQ provided a response to comments document addressing the EPA's comments as well as all comments received during the public comment period at the time of final air construction permit issuance. MDEQ revised certain permit conditions to address the EPA's concerns.

Clean Water Act Section 402 Permit: The EPA provided comments on the draft NPDES permit during the public comment period. In accordance with the EPA's Memorandum of Agreement with MDEQ for the NPDES permit program, we received from MDEQ on February 1, 2017, a revised version of the permit and MDEQ's responses to comments. The EPA is in the process of reviewing the revised draft permit and MDEQ's responses to the comments received during the public comment period that concern the draft NPDES permit.

Clean Water Act Section 404 Permit: In August 2016, the EPA objected to MDEQ issuing a Wetlands and Inland Lakes and Streams Permit under its assumed CWA Section 404 program. Aquila Resources Inc. subsequently withdrew its MDEQ permit application. In January 2017, Aquila Resources Inc. re-applied to MDEQ.¹ After finalizing its completeness review, MDEQ will issue a public notice, at which time, the public, tribes and the EPA will have an opportunity to provide comments. The EPA will provide a thorough review of the revised permit application.

The EPA will continue to exercise its oversight with respect to the Clean Air Act and Clean Water Act permits. The agency's staff would be available to discuss concerns you have with these permits, as discussed above.

Thank you for your interest in this matter. If you have further questions, please contact Peter Swenson,

¹ The permit application can be found in MDEQ's MiWaters database at <https://miwaters.deq.state.mi.us/miwaters/#/external/home> by searching the map application for "55-Aquila Resources."

Chief of the Watersheds and Wetlands Branch, Region 5, at (312) 886-0236.

Sincerely,

Catherine R. McCabe
Acting Administrator